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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JERRY WAYNE YOUNG,
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13 v. Petitioner,
14 PARAMO, Warden
15 Respondent.

Civil No. 15-1054 BEN (MDD)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

16 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of
17 Habeas Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the \$5.00 filing fee
18 and has failed to move to proceed in forma pauperis.

19 **FAILURE TO SATISFY THE FILING FEE REQUIREMENT**

20 Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing
21 fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without
22 prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with
23 this case, he must submit, **no later than July 26, 2015**, a copy of this Order with the
24 \$5.00 fee or with adequate proof of his inability to pay the fee. The Clerk of Court shall
25 send a blank Southern District of California In Forma Pauperis Application to Petitioner
26 along with a copy of this Order.

27 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

28 Further, habeas petitioners who wish to challenge either their state court

conviction or the length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.” *Id.* at 366 (emphasis added).

Nowhere on the Petition does Petitioner allege that he raised his claims in the California Supreme Court. (*See* Pet. at 6.) If Petitioner has raised his claims in the California Supreme Court he must so specify. “The burden of proving that a claim has been exhausted lies with the petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the

1 Constitution or laws of the United States is removed, if the
 2 applicant was prevented from filing by such State action;

3 (C) the date on which the constitutional right asserted
 4 was initially recognized by the Supreme Court, if the right has
 been newly recognized by the Supreme Court and made
 retroactively applicable to cases on collateral review; or

5 (D) the date on which the factual predicate of the claim
 6 or claims presented could have been discovered through the
 exercise of due diligence.

7 28 U.S.C. § 2244(d)(1)(A)-(D) (West 2006).

8 The statute of limitations does not run while a properly filed state habeas corpus
 9 petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006
 10 (9th Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an
 11 application is ‘properly filed’ when its delivery and acceptance [by the appropriate court
 12 officer for placement into the record] are in compliance with the applicable laws and
 13 rules governing filings.”). However, absent some other basis for tolling, the statute of
 14 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533
 15 U.S. 167, 181-82 (2001).

16 Rule 4 of the Rules Governing Section 2254 Cases provides for summary
 17 dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any
 18 exhibits annexed to it that the petitioner is not entitled to relief in the district court . . .”
 19 Rule 4, 28 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is
 20 not presently entitled to federal habeas relief because he has not alleged exhaustion of
 21 state court remedies.

22 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

23 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases,
 24 Petitioner has failed to allege that his state court conviction or sentence violates the
 25 Constitution of the United States.

26 Title 28, United States Code, § 2254(a), sets forth the following scope of review
 27 for federal habeas corpus claims:

28 The Supreme Court, a Justice thereof, a circuit judge, or a
 district court shall entertain an application for a writ of habeas

corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir. 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the United States.” *See* 28 U.S.C. § 2254(a).

Here, Petitioner claims that he “tried and acquitted” on an eight count information and later retried and convicted. (*See* Pet. at 6-7.) In no way does Petitioner claim he is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

Further, the Court notes that Petitioner cannot simply amend his Petition to state a federal habeas claim and then refile the amended petition in this case. He must exhaust state judicial remedies before bringing his claims via federal habeas. State prisoners who wish to challenge their state court conviction must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. *See* 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court judicial remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the

1 due process of law guaranteed by the Fourteenth Amendment, he must say so, not only
 2 in federal court, but in state court.” *Id.* (emphasis added).

3 **IN CUSTODY REQUIREMENT**

4 Finally, upon review of the documents filed in this case, it is unclear whether
 5 Petitioner is in custody pursuant to the California conviction he challenges in the
 6 Petition. “Subject matter jurisdiction under the federal habeas corpus statute, 28 U.S.C.
 7 § 2254(a), is limited to those persons ‘in custody pursuant to the judgment of a State.’”
 8 *Brock v. Weston*, 31 F.3d 887, 889 (9th Cir. 1994); *see also* 28 U.S.C. § 2241(c)(3). It
 9 is a jurisdictional requirement that, at the time a habeas petition is filed, “the habeas
 10 petitioner be ‘in custody’ under the conviction or sentence under attack.” *Maleng v.*
 11 *Cook*, 490 U.S. 488, 490-91 (1989) (citing 28 U.S.C. §§ 2241(c)(3) & 2254(a)); *see*
 12 *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)).

13 Here, Petitioner appears to challenge the validity of his 1999 conviction in San
 14 Diego Superior Court case number SCD145402. He states he was sentenced to 365 days
 15 for that conviction and released on January 31, 2000. (*See* Pet. at 1-2.) Thus, although
 16 it appears Petitioner is currently incarcerated, it is not clear from the face of the Petition
 17 that he is in custody pursuant to the conviction he seeks to challenge. “[O]nce the
 18 sentence imposed for a conviction has completely expired, the collateral consequences
 19 of that conviction are not themselves sufficient to render an individual ‘in custody’ for
 20 the purposes of a habeas attack upon it.” *Maleng*, 290 U.S. at 490; *see Feldman v.*
 21 *Perrill*, 902 F.2d 1445, 1448 (9th Cir. 1990) (stating that an expired conviction cannot
 22 satisfy the “in custody” requirement).

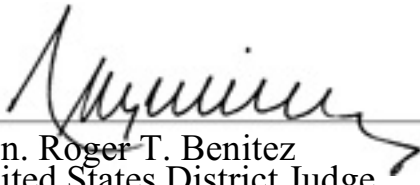
23 **CONCLUSION**

24 For the foregoing reasons, the Petition is **DISMISSED** without prejudice for
 25 failure to satisfy the filing fee requirement, failure to allege exhaustion, failure to state
 26 a cognizable claim and failure to satisfy the custody requirement. In order to have this
 27 case reopened, Petitioner must, **no later than July 26, 2015**, (1) either pay the filing fee
 28 or provide adequate proof of his inability to pay; **and** (2) file a First Amended Petition

1 which cures the pleading deficiencies discussed above. *For Petitioner's convenience,*
2 *the Clerk of Court shall attach to this Order a blank in forma pauperis application and*
3 *a blank First Amended Petition form.*

4 **IT IS SO ORDERED.**

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6 DATED: June 3, 2015

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9 Hon. Roger T. Benitez
10 United States District Judge
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